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OCTOBER TERM, 1956

NO. [redacted] 202

DISTRICT 50, UNITED MINE WORKERS OF AMERICA,

Petitioner

vs.

TUNGSTEN MINING CORPORATION,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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NO. 1100

DISTRICT 50, UNITED MINE WORKERS OF AMERICA,

Petitioner

vs.

TUNGSTEN MINING CORPORATION,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Fourth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Where a labor Union has been certified by the National Labor Relations Board as exclusive bargaining representative of employees and where there has been no decertification of such bargaining agency by the Board, nor any effort to obtain such decertification, is it not unlawful for a rival Union to strike to obtain recognition as exclusive bargaining agent of the same employees—even though there be evidence that the employees have transferred their allegiance to such rival Union?

The Court below, and another Court of Appeals as well, having ruled that such a strike is barred by the Labor-Management Relations Act, 29 U.S.C.A. Section 187(a)(3), and there being no disagreement among the Appellate Courts on the matter, should this Court now grant certiorari to review such ruling?

STATUTORY PROVISIONS INVOLVED

"It shall be unlawful . . . for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike . . . where an object thereof is . . . forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title."

29 U.S.C.A. Section 187(a)(3)

"Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit."

29 U.S.C.A. Section 187(b)

STATEMENT OF THE CASE

The plaintiff, now Respondent before this Court, operates a tungsten mine and processing plant in Vance County, North Carolina. In 1946 the National Labor Relations Board conducted an election among the plaintiff's employees, in which a majority of the employees voted to be represented by a labor organization, the United Stone

Workers and Allied Products Workers of America, CIO. Thereafter the Stone Workers Union was officially certified by the Labor Board as bargaining representative of the plaintiff's employees and after negotiations a contract was signed between that Union and the plaintiff Company (12, 22)[1].

For several years thereafter renewal contracts were negotiated and such a contract existed between the Stone Workers Union and the plaintiff at the time of the strike here in question (12, 107, 108). There is no contention but that relations between the Stone Workers Union and the plaintiff were at arms length, some of the renewal contracts between them having been arrived at only after lengthy negotiations, threats of strike and mediation (29, 44).

In October of 1952 representatives of the defendant, District 50, United Mine Workers of America, now Petitioner before this Court made claim to the plaintiff that their Union represented the plaintiff's employees and demanded that the plaintiff recognize and deal with the defendant as exclusive bargaining representative of the employees. The plaintiff declined to accord such recognition to the defendant Union.

There is conflicting evidence as to whether a majority of the plaintiff's employees had in truth transferred allegiance from the Stone Workers Union to the defendant Union. The Company had in its files check-off cards, signed by the great majority of its employees, authorizing the Company to deduct dues for the Stone Workers Union from their pay (42, 58, 63). Employees were at

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[1] Unless otherwise indicated, all page references are to the printed Appendix to the Respondent's brief filed in the Court below.

liberty to revoke these check-off cards by notice to the Company at any time (58). Only a few ever did so (65).

Representatives of the defendant Union asserted to the Company, however, that a majority of the employees had "signed up" with the defendant (57). But the defendant did not petition the National Labor Relations Board for an election to decertify the Stone Workers Union or to have itself certified as representative of the employees. The defendant conceded that in fact it could not do so, the facilities of the National Labor Relations Board being closed to it because of its non-compliance with the filing requirements of the Labor-Management Relations Act[1] (13, 57, 89). Nor was any petition filed by or on behalf of the employees for decertification of the Stone Workers Union.

After the defendant's request for recognition was made and refused, its organizational efforts among the plaintiff's employees were nevertheless steadily continued (15). On January 9, 1953 a strike among plaintiff's employees commenced. Promptly the defendant espoused this strike and proclaimed the recognition of the defendant Union as agent of the employees to be a principal purpose of the strike (117, 118, 119, 120, 121, 122).

It is substantially uncontested that this strike was directed, sustained and carried on by the defendant Union and that a major object of the strike was to compel the plaintiff to recognize the defendant as the bargaining agent of the employees. The circumstances establishing this are hereinafter more fully set forth.

The strike was accompanied by a great deal of violence (15). The cessation of production constituted, however,

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[1] 29 U.S.C.A. Section 159 (f), (g) and (h).

the substantial damage to the plaintiff's business, for which recovery is sought in the present action. The plaintiff's case therefore rests upon its contention that the strike was a strike in violation of law.

ARGUMENT

I. The Defendant Violated Express Provisions of the Labor-Management Relations Act By Engaging In A Strike To Obtain Recognition As Bargaining Agent Of The Plaintiff's Employees At A Time When Another Labor Organization Held A Labor Board Certification As Exclusive Agent Of These Employees.

As has been noted above, the Labor-Management Relations Act, 29 U.S.C.A. Section 187(a)(3), provides that:

> "It shall be unlawful . . . for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike . . . where an object thereof is . . . forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title."

This Statute would seem to be plain and clear. It applies precisely to the factual situation of the present case.

It is undenied that "another labor organization" than the defendant Union, namely the Stone Workers Union, had been "certified as the representative" of the plaintiff's employees. It likewise cannot be disputed that despite the certification outstanding to the Stone Workers Union, the defendant Union did "engage in" and "encourage the employees" of the plaintiff "to engage in a strike" and

that "an object thereof" was "forcing or requiring" the plaintiff "to recognize or bargain with" the defendant Union "as the representative" of the plaintiff's employees. If there should be any question as to whether such was the situation here, the facts may be readily summarized.

Shortly after representatives of the defendant requested the plaintiff to recognize the defendant as bargaining agent of the plaintiff's employees, the defendant's Regional Director wrote to the National Labor Relations Board stating "as a matter of record" that his "organization" intended to press its claim for recognition by every means "including that of strike action if necessary" (116, and 57). On the day after the strike began, the defendant's Regional Director wrote out a "press release," which was published in the local newspaper, stating that the strike "in addition" to being in protest against the discharge of two employees, would "also be a strike for recognition of the United Mine Workers of America" (117 and 85, 90, 100).

Promptly thereafter the defendant opened nearby a strike headquarters, with a prominent sign in front of it reading: "District 50—United Mine Workers of America —Strike Headquarters" (118 and 39, 76). During the strike representatives of the defendant were continually at and around the plaintiff's premises (15, 93, 94). They caused picket signs to be there set up, all of which bore the words: "On Strike" and all of which also bore the name: "District 50, United Mine Workers of America" (119, 120, 121, 122 and 63, 64, 76, 84, 90, 91 93). Some of these signs read: "On Strike—For Recognition, Better Wages and Conditions of Employment—District 50, United Mine Workers of America" (120, 121). The District Court found as a fact that "the Union furnished picket signs demanding recognition" and that the defend-

ant "formally adopted" the strike "for the purpose of getting recognition" (15). The defendant's representatives held meetings with the strikers (94) and arranged bonds for those who were indicted for acts of violence (78, 79).

The defendant Union headed the list of defendants against whom an injunction was issued, because of strike violence, by the Superior Court of Vance County, North Carolina (15). Tungsten Local Union, United Mine Workers of America was the sole defendant named in an injunction issued by the District Court, in which the Union was ordered to halt the strike. Upon that injunction issuing against the Union defendant, the strike did end (15).

In view of such facts, the defendant cannot seriously contend that it did not "engage in" or "encourage" the plaintiff's employees "to engage in" the strike. Nor can the defendant deny that "an object" of the strike was to put pressure on the plaintiff "to recognize or bargain with" the defendant "as the representative" of plaintiff's employees.

As is pointed out in *United Mine Workers of America vs. Patton*, 211 F2d 742, 746-748 (C. A. 4), where such facts as outlined above are present, in order to impute strike responsibility to a labor Union, it is certainly not necessary to produce an official resolution of the Union "authorizing or ratifying" the strike.

The Court below thus summarizes the matter:

> "Whether or not District 50 induced the employees of Tungsten initially to strike, it certainly encouraged them in the strike, and was itself engaged in the strike at least after January 14, 1953. One of the purposes of the strike was to force or require Tungsten to bargain with District 50 as the representative of

> Tungsten's employees. During all the time in question, another labor Union, Stone Workers, had been certified by the Board as the exclusive collective bargaining representative of Tungsten's employees. That certification had not and has not been revoked. The case would seem to come literally and exactly within the coverage of Section 187(a)(3) supra."
>
> *Tungsten Mining Corporation vs. District 50, United Mine Workers of America* 242 F2d 84, 88 (C. A. 4)

Since there was here a strike which the defendant engaged in, an object of which was to force the plaintiff to recognize the defendant as bargaining agent of the plaintiff's employees, whereas another labor organization had been certified by the National Labor Relations Board as such agent, and since the Statute plainly and expressly declares that a strike in such circumstances is unlawful and that whoever is injured in his business by such a strike can recover therefor—is the case not thus concluded?

II. The Unlawfulness Of The Strike Is Not Altered By The Fact That The Plaintiff's Emloyees May Have Shifted Allegiance From The Certified Union To The Defendant Union.

To all of the foregoing the defendant makes the following answer:—that the Statute is not to be enforced as written, but that there is to be added to it by implication or interpretation a proviso to the effect that an outstanding certification to "another labor organization" is not intended to bar a strike on the part of a Union seeking recognition if the circumstances are such that the employer could legally accord recognition to the new claimant. It is respectfully submitted that the Statute cannot thus lightly be rewritten. And such is the holding, not only of the Court below but also of the only other Appellate Court which

has considered the question. *Parks vs. Atlanta Printing Pressmen and Assistants' Union*, 243, F2d 284 (C. A. 5).

Despite the conflict of evidence here as to whether a majority of the plaintiff's employees had in fact shifted their allegiance from the Stone Workers Union to the defendant Union, let it be assumed that such was the case. Then upon the defendant's offering to produce evidence to such effect, as it did, and all the circumstances being such that the plaintiff could reasonably have doubted whether a majority of the employees still desired to be represented by the Stone Workers Union—in such situation the plaintiff could lawfully have ceased to recognize the Stone Workers Union as bargaining agent and could have petitioned the National Labor Relations Board for an election in order to determine definitely whether the employees did or did not still desire to be represented by the Stone Workers Union. *Brooks vs. National Labor Relations Board*, 348, U. S. 96, 104. Doubtless the plaintiff, in such situation, could have proceeded to recognize the defendant Union without going through any Labor Board procedure. *Brooks vs. National Labor Relations Board, supra* Perhaps the plaintiff should have done so.

But it does not follow from any of this that the defendant Union was at liberty to strike for recognition—because the Statute unqualifiedly forbade it to do so, the certification to the Stone Workers Union being still outstanding.

The bar of that outstanding certification could readily have been removed, although the plaintiff chose not to petition for its removal and although the defendant Union, by its own choosing, was disqualified to petition for the removal of that bar. The employees themselves, if as the defendant contended they no longer desired to be represented by the Stone Workers Union, could have petitioned

for and obtained through the National Labor Relations Board an official decertification of the Stone Workers Union[1]. If then the plaintiff still refused recognition to the defendant, the defendant would have been free to strike for such recognition. But none of these steps having been taken to cancel the outstanding certification, it stood by clear mandate of the Statute as an absolute bar to any strike for bargaining agency recognition.

The District Court[2], and likewise the District Court, in the case of *Parks vs. Atlanta Printing Pressmen and Assistants' Union*,[3] fell into the error of concluding that since the employer in such situation is free to accord recognition to a new Union claimant, although a certification to another labor organization be outstanding, therefore it must be that the new claimant is free to strike for recognition in the event recognition is not voluntarily accorded by the employer. As expressed by the District Court in the instant case:—"I am of the opinion that Tungsten was at liberty to recognize District 50 . . ." (20).

This the plaintiff concedes, but, as has been emphasized, it does not follow from this that District 50 could strike for recognition. The question is not whether "Tungsten was at liberty to recognize District 50" but whether District 50 was at liberty to strike for recognition. The vital point of the case is that, under the circumstances, the law permitted the employer to accord recognition to the new Union claimant, but under the same circumstances, the Statute positively and unequivocally forbade the new Union claimant to strike for recognition.

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[1] 29 U.S.C.A. Section 159(c)(1)(A)(iii).
[2] 142 F. Supp. 800 (E. D. N. C.)
[3] F. Supp. , 38 LRRM 2531 (N. D. Ga.)

In *United Mine Workers of America vs. Arkansas Oak Flooring Company*, 351 U.S. 62, 75, this Court recognized that the right of a Union to strike in order to compel an employer to recognize it as exclusive bargaining representative is not limited "except in the face of another Union's certification"[1].

No matter that the Statute in question is plain, positive and unambiguous, the defendant's contention is that by "interpretation" it must be changed to mean that Labor Board certification, though outstanding, is not a bar to a strike for recognization if employee allegiance has shifted. With respect to this, the well-reasoned opinion in *Parks vs. Atlanta Printing Pressmen and Assistants' Union* thus analyzes the matter:

> "At the outset it is significant that Congress in Section 8(b)(4) and 303(a)(3) did not, as it might, speak in terms of a labor organization 'designated' or selected by a majority of the employees' or 'then representing a majority of the employees', or one with whom the 'employer is by law required to bargain collectively'. Such descriptive standards, though capable of tangible delineation, would unavoidably present substantial questions of fact in application. This difficulty was eliminated altogether by using the precise standard of a union which has been 'certified as the representative of such employees under the provisions of section 9 of the Act'" . . .
>
> "Referring, as it did, to certifications under Section 9, Congress must have intended to include not only

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[1] In this connection the Court cited—Report of the Joint Committee on Labor-Management Relations, No. 986, Pt. 3, 80th Cong., 2d Sess. 71; S. Rep. No. 105, 80th Cong., 1st Sess. 22; HR Conf. Rep. No 510, 80th Cong. 1st Sess. 43.

the fact of initial certification but the statutory process of altering or terminating a certification. This, of course, specifically covers the exact situation where it is claimed that a certified union no longer represents a majority. Thus, this is not a case in which by judicial action we must fill an inadvertent legislative void. For here machinery is prescribed which fully meets initial and changing needs."

"If the whole thing is equated with the employer's ultimate obligation to bargain, then the fact of certification in determining availability of the remedies of Sections 8(b)(4)(C) and 303(a)(3) becomes virtually immaterial after the first year."

Parks vs. Atlanta Printing Pressmen and Assistants' Union, 243 F2d 284, 287, 289 (C. A. 5)

The reason and policy of Congress' shutting off the use of strike force until there has been decertification by the Labor Board is certainly understandable. As pointed out by this Court in *Brooks vs. National Labor Relations Board*:

"The underlying purpose of this Statute is industrial peace . . . Congress has devised a formal mode for selection and rejection of bargaining agents . . . with a view of furthering industrial stability and with due regard to administrative prudence."

Brooks vs. National Labor Relations Board, 348 U.S. 96, 103

The Court of Appeals in the case of *Parks vs. Atlanta Printing Pressmen and Assistants' Union* emphasized this basic consideration in the following words:

> "Wherever and whenever, the policies of the Act would be infringed, thwarted, or impeded by continued recognition of a prior certification, a ready and workable means is at hand to rescind it. That machinery is simple and available and assures that if, as will generally be the case, there is dispute and controversy over the necessity and desirability of decertification and change, the facts can be surveyed by the Board as a disinterested tribunal" . . .
>
> "And the principal distinction is again the fundamental difference between determination of the controversy in a deliberative forum with its appeal to a reasoned, impartial consideration of reliable facts as opposed to decision wrought by the unleashing of native jungle forces of sheer economic power with the likelihood, if history is to be our guide, that where spirits are high and feelings deep, economic pressure may soon have physical power as an ally."
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> *Parks vs. Atlanta Printing Pressmen and Assistants' Union*, 243 F2d 284, 287, 289 (C. A. 5)

It must be kept in mind that the District Court in the present case was completely in error when it said that except by resorting to strike "no other avenue of relief was open to the defendant and the majority of the employees which it represented. Recourse to the Board was not available . . ."(20). Though the plaintiff Company had not seen fit to petition for cancellation of the outstanding certification and though the defendant Union, of its own choosing, had not qualified to do so, still, as has been emphasized, the employees were completely free and able to do so[1]. The District Court was simply mistaken in

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[1] 29 U.S.C.A. Section 159(c)(1)(A)(ii).

thinking that "recourse to the Board was not available" and that the employees and the defendant "had no other avenue of relief", except to strike in the face of the outstanding certification.

Further, the District Court observed that although the defendant Union chose not to use the facilities of the Labor Board, it "was not precluded from representing employees as bargaining representative" (20). *United Mine Workers of America vs. Arkansas Oak Flooring Company*, 351 U.S. 62. *District 50, United Mine Workers of America vs. National Labor Relations Board*, 234 F2d 565 (C. A. 4). This is correct but it must be repeated that the issue in the present case is not whether this Union had capacity or standing to be the bargaining agent of the plaintiff's employees. The one and only issue is whether this Union was at liberty to strike for recognition as the bargaining agent of the plaintiff's employees, while the certification to the Stone Workers Union remained outstanding. This issue the Statute answers, plainly and without equivocation, in the negative. And for its disregard of the Statute's provisions, the defendant is, by the same Statute, expressly made liable in damages.

In the instant case there are these additional remarkable circumstances. In ruling for the defendant the District Court not only disregarded the clear and simple mandate of the Statute, but the District Court also apparently overlooked the fact that it had itself ordered (15) the defendant Union to end the very strike which is here in question, upon the ground that such strike was forbidden by provisions in the unfair labor practice section of the Act, identical to those now under consideration, 29 U.S.C.A. 158(b)(4)(c). If this strike was unlawful under 29 U.S.C.A. Section 158(b)(4)(c), then why was it not unlawful under the identical language of the later section,

in the same Statute, that is, 29 U.S.C.A. Section 187(a)(3)? If the strike was so unlawful as to require its being altogether halted by an exercise of the District Court's injunctive power, then how was it ruled lawful by the same Court in a suit for damages?

Not only did the District Court disregard this inconsistency, but likewise it took no note of the fact that after it had ordered the strike ended upon grounds of its being unlawful, the Labor Board rendered a final Decision and Order, in which it found and concluded that the strike had been unlawful under the unfair labor practice section of the Act, which, it should be repeated, is entirely identical in its provisions to the section upon which the present action is brought. Lastly, there is to be added the fact, also disregarded by the District Court, that the Court of Appeals for the Fourth Circuit affirmed the Decision and Order of the Labor Board in that proceeding[1], thereby placing final confirmation upon the conclusion that the strike in question was unlawful. Yet, in the face of all this, the District Court later, in the present case, adjudged the same strike to be lawful! In such situation the Court below rightly reversed the action of the District Court.

CONCLUSION

The Appellate Courts being in agreement with respect to the question here at issue and upon all of the foregoing

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[1] *National Labor Relations Board vs. District 50, United Mine Workers of America*, C. A. 4—No. 6738.

it being manifest that their ruling on this issue is correct, it is respectfully submitted that such ruling should not now be disturbed and that the Petition for Certiorari should be denied.

Respectfully submitted,

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